

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL CHESTER,

Defendant.

2:06-cr-00309-RCJ-PAL-1

ORDER

In December 2007, a jury convicted Defendant Carl Chester of three counts of possession of a controlled substance with intent to distribute. The Court sentenced Defendant to 264 months of imprisonment, to be followed by five years of supervised release. Defendant appealed, and the Court of Appeals affirmed in March 2009. Defendant later successfully moved in state court to have a state criminal judgment against him amended. Defendant then filed a habeas corpus motion in this Court under 28 U.S.C. § 2255, arguing, *inter alia*, that he should be resentenced because the original sentencing was based on a career offender finding that could not be supported in light of the correction to the state court judgment. In October 2011, the Court granted the motion as to resentencing but denied the motion as to the claims of ineffective assistance of counsel and prosecutorial misconduct. In March 2012, the Court resentenced Defendant to 168 months of imprisonment, to be followed by five years of supervised release. Defendant appealed, and the Court of Appeals affirmed in August 2013.

Defendant filed a second § 2255 motion. The Court denied the motion, stating that Defendant would have to petition the Court of Appeals for permission to file a successive motion

1 under § 2255. *See* 28 U.S.C. § 2255(h). Defendant filed a motion to reconsider, noting that a
2 § 2254 motion is not “second or successive” under the statute if an amended judgment and
3 sentencing has intervened since the first motion was adjudicated. *See Wentzell v. Neven*, 674 F.3d
4 1124, 1127 (9th Cir. 2012). The Court, assuming *arguendo* that the Court of Appeals would read
5 “second or successive” under § 2255(h) to mean the same thing as it does under § 2244(b),
6 declined to reconsider, denying the arguments on the merits.

7 Defendant also asked the Court to issue a certificate of appealability, sanction the United
8 States, enter default judgment in his favor, hold an evidentiary hearing, release him or transfer
9 him to a facility closer to Las Vegas in anticipation of an evidentiary hearing, and appoint
10 counsel. The Court denied those motions. The Court of Appeals denied a motion for a
11 certificate of appealability. Defendant filed several more motions asking the Court to reconsider
12 and reassign the case to a new judge. The Court denied those motions. Defendant later filed
13 several more motions for appointment of the Federal Public Defender that the Court had
14 permitted to withdraw due to a conflict of interest, for reassignment to a new judge, and to order
15 a settlement of Defendant’s appeal. The Court denied the motions. Defendant later asked the
16 Court to issue a certificate of appealability as to the order denying those motions. The Court
17 denied the motion. The Court also denied a motion titled “Motion of Actual Innocence and
18 Unlawful Incarceration.”

19 Defendant later asked the Court to reconsider its April 17, 2014 order denying his second
20 § 2255 motion based on the state court having corrected certain records. Specifically, he noted
21 that the state court had since corrected its own record to reflect that “Def[endan]t as part of his
22 negotiations in [Case No. C201197] indeed pled guilty in [Case No. 03M284706X].” That did
23 not tend to show that the two sentences should be counted as one under the Guidelines, however.
24 The relevant provision reads:

25 If the defendant has multiple prior sentences, determine whether those

1 sentences are counted separately or as a single sentence. Prior sentences always
2 are counted separately if the sentences were imposed for offenses that were
3 separated by an intervening arrest (i.e., the defendant is arrested for the first
4 offense prior to committing the second offense). If there is no intervening arrest,
5 prior sentences are counted separately unless (A) the sentences resulted from
6 offenses contained in the same charging instrument; or (B) the sentences were
7 imposed on the same day. Count any prior sentence covered by (A) or (B) as a
8 single sentence.

9 U.S.S.G. § 4A1.2(a)(2). The evidence adduced by Defendant only tended to show that both cases
10 were resolved as a part of the same negotiations. The evidence did not tend to answer the
11 relevant questions of whether Defendant was arrested for the first offense before he committed
12 the second offense or, if not, whether both offenses were included in the same charging
13 instrument (almost certainly not the case, as the offenses were charged in different courts, i.e., the
14 Las Vegas Justice Court and the Eighth Judicial District Court) or whether the sentences were
15 imposed on the same day (also unlikely for the same reason).

16 Defendant also argued that his resentencing counsel failed to discuss the pre-sentence
17 report with him. But the Court of Appeals had already denied a certificate of appealability as to
18 the Court's April 17, 2014 dismissal order, in which the Court denied, *inter alia*, Defendant's
19 claims of ineffective assistance of re-sentencing counsel because the motion was successive.

20 Defendant later asked the Court to correct the presentence investigation report and to
21 reconsider its denial of his previous § 2255 motion. Defendant argued that the prior offenses
22 recounted, *supra*, were part of the same charging instrument because they were resolved via the
23 same plea agreement and judgment. The Court denied the motion.

24 Defendant later asked the Court to correct the Judgment due to the alleged
25 unconstitutionality of one of the conditions of supervised release and also due to its failure to
identify the precise number of days credit for time served, as reflected in the presentence
investigation report. The Court denied the motion as a successive motion under § 2255. *See* 28
U.S.C. § 2255(h). The Court and the Court of Appeals denied a certificate of appealability.

1 Defendant most recently asked the Court to reduce his sentence under Amendment 782 to
2 the Guidelines. He noted that in March 2012 he was resentenced to 168 months, the low end of
3 the Guidelines range of 168–210 months, pursuant to a total offense level of 30 and a criminal
4 history category of VI. He argued that under the retroactively applicable Guidelines, he would be
5 subject to a range of 140–175 months, because his total offense level for the amount of drugs at
6 issue would be 28. He therefore requested resentencing at the low end of the recalculated
7 Guidelines range, i.e., 140 months.

8 The Government argued that the Court did not have jurisdiction to consider the motion
9 due to a pending appeal as to the sentence. In reply, Defendant argued that the motion did not
10 implicate any issues before the Court of Appeals. The Court noted that the only issue certified
11 for appeal was “whether appellate counsel rendered ineffective assistance by failing to argue that
12 the Fair Sentencing Act applied at the 2012 resentencing, including whether appellant is entitled
13 to a reduced term of supervised release, or reclassification of his convictions.” A determination
14 of the Amendment 782 issue was not certified for appeal and was therefore not “involved in the
15 appeal.” *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Defendant
16 noted that amending a judgment pursuant to Amendment 782 would not require a resentencing
17 hearing or even a new presentence investigation report, and that Defendant could not bring the
18 motion via habeas corpus motion under 28 U.S.C. § 2255, but only via 18 U.S.C. § 3582(c)(2).
19 He argued that awaiting the mandate from the pending appeal could prejudice him, because if the
20 Court were to grant the motion and resentence him to the low end of 140 months, he would be
21 entitled to immediate release.

22 The Court found that Defendant potentially qualified for a retroactive two-point
23 reduction. As he noted, he was sentenced based on 166.4 grams of cocaine base, giving a base
24 offense level of 28. (*See Resentencing Tr.* 13:23–14:3, ECF No. 220). The base offense level for
25 that amount under Amendment 782 is indeed 26. *See U.S.S.G. § 2D1.1(c)(7)* (2014). His total

1 offense level would then be 28. Combined with a criminal history category of VI, he would
2 indeed face a Guideline range of 140–175 months. The Court, however, found that considering
3 the § 3553(a) factors, a term of 168 months was still appropriate. As the Court had previously
4 noted after thorough discussion, 168 months was a sufficient sentence, but the Court could not in
5 good conscience sentence Defendant below that term. (*See* Resentencing Tr. 33–42). That term
6 was still within the retroactively recalculated Guidelines range, and the Court found that it was
7 still appropriate. As to the policy statement in § 1B1.10, Defendant did not argue how any of the
8 Court’s statements in justifying the sentence imposed at the 2012 resentencing hearing under
9 § 3553(a) were no longer valid. The Court also found that public safety still favored the current
10 sentence. As noted at the 2012 hearing, the Court believed the 168-month sentence is necessary
11 to ensure the rehabilitation of Defendant, who, although redeemable and who appeared to be
12 working towards rehabilitation, had an extensive criminal history. Finally, Defendant did not
13 adduce any evidence of post-sentencing conduct that would mitigate in favor of a reduction and
14 in fact appeared not to desire that a new presentence investigation report be prepared.

15 Defendant has asked the Court to reconsider the denial of the motion to reduce his
16 sentence. The Court declines to reconsider.

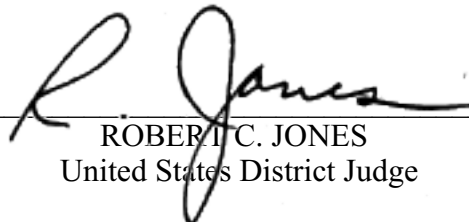
17 CONCLUSION

18 IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 356) is DENIED.

19 IT IS SO ORDERED.

20 Dated January 4, 2017.

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ROBERT C. JONES
United States District Judge